

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re RODOLFO R., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

RODOLFO R.,

Defendant and Appellant,

F037756

(Super. Ct. No. 52915)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County, Hugo J. Loza, Commissioner.

James T. Wilson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Wanda Hill Rouzan and Virna L. Depaul, Deputy Attorneys General, for Plaintiff and Respondent.

STATEMENT OF THE CASE

*Before Dibiaso, Acting P.J., Harris, J. and Levy, J.

On December 12, 2000, in the Tulare County Superior Court, sitting as a juvenile court, a petition under Welfare and Institutions Code section 602 was filed against Rodolfo R.,¹ a 15 year-old minor. The petition alleged in counts I-III that the minor, on or about December 9, 2000, committed three separate second degree robberies (Pen. Code, § 211).² A different victim was named in each count. Each count was alleged to be a “serious” felony within the meaning of section 1192.7, subdivision (c). Counts I-III each included two special allegations: the personal use of a firearm (§ 12022.53, subd. (b)) and personal use of a deadly weapon within the meaning of section 12022, subdivision (b)(1) and section 1192.7, subdivision (c)(23), again making the underlying substantive offenses “serious” felonies.

Count IV charged the minor with committing an assault with a firearm on December 9, 2000, in violation of section 245, subdivision (a)(2). The victim in count IV was the same victim as alleged in count I. Count IV further alleged the minor personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (d) and section 1192.7, subdivision (c)(8), the latter allegation also defining a “serious” felony.

At the detention hearing on December 13, 2000, the minor denied all of the allegations of the petition. The parties, by written stipulation, agreed Commissioner Hugo J. Loza would hear this matter in its entirety as a temporary judge.

On January 24, 2001, a first amended petition was filed in the matter. Count III was amended to allege an attempted second degree robbery (§ 664/211), the remaining counts and all special allegations for each count, including count III, were the same as those alleged in the initial petition.

¹ Hereinafter referred to as the minor.

² All further references will be to the Penal Code unless otherwise indicated.

The adjudication hearing was held on February 7, 2001, before the Honorable Hugo J. Loza. At the conclusion of the hearing, Commissioner Loza pronounced his findings and found count I, a violation of section 211, to be true beyond a reasonable doubt. The personal use of a firearm allegation (§ 12022.53, subd. (a)) was found not true. Instead, the court found true a violation of section 12022, subdivision (a)(1), concluding the minor did not personally use a firearm, but that a principal in the commission of that offense did. As to count II, which was alleged as a violation of section 211, the court found as true the lesser included offense of grand theft from the person (§ 487, subd. (c)),³ and also found the special allegations not true as to count II. In count III, the attempted second degree robbery, the court found true the lesser included offense of attempted grand theft person⁴ (§664/487, subd. (c)). The court found the special allegations, as to count III, not true. The court found count IV to be true as to a violation of section 245, subdivision (a)(1). Each offense was declared to be a felony.

At the disposition hearing on March 6, 2001, the court adjudged the minor a ward of the court and, in lieu of a commitment to the California Youth Authority, ordered the minor into the custody of the Tulare County Probation Department and to complete the 365-day program at the Tulare County Youth Facility. The maximum confinement for the offenses was designated to be eight years, with the minor receiving 88 days of pre-

³ The actual pronouncement of the court stated the violation as section 487, which is grand theft. However, since the court found this to be a lesser-included offense, it was necessarily finding it to be a violation of section 487, subdivision (c). (See *People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

⁴ The actual pronouncement of the court states it was finding a violation of section 664/487, subdivision (3)(c). There is no section 487, subdivision (3)(c), there is a section 487, subdivision (c), which is grand theft from the person, which is what the court indicated it was finding as true.

disposition custody credits. The minor was also ordered to make restitution to the victims.

On March 13, 2001, the minor timely filed his notice of appeal.

STATEMENT OF FACTS

At the adjudication hearing each of the victims testified, as did the investigating officers. The minor's defense to the charges was based upon the alibi testimony of his uncle and mistaken identity.

At approximately 8:24 p.m. on December 9, 2000, several deputy sheriffs were dispatched to two locations in Cutler, California, to investigate robberies that had just occurred. While transporting one of the victims of the robberies to the Orosi substation for further interview, Deputy Schrader saw five male Hispanics, matching the description of the robbers described by one of the victims, walking down the street. One was wearing a black shirt and white pants. Deputy Schrader radioed this information to his supervisor and was advised that Deputy Hernandez would initiate a stop of the five males. At approximately 9:05 p.m., Deputy Hernandez stopped the five males, and Deputy Schrader pulled in behind Deputy Hernandez's vehicle. As Deputy Schrader exited his vehicle and began walking up to Deputy Hernandez's vehicle, the male wearing the black shirt and white pants took off running. Deputy Schrader chased after him. While the suspect was running away, he dropped a toy handgun, which Deputy Schrader retrieved. The suspect eluded pursuit and was not apprehended or identified.

As Deputy Schrader chased after the suspect, Deputy Hernandez heard him yell out "He's got a gun," and Deputy Hernandez drew his weapon and told the remaining four males not to move. Deputy Hernandez was assisted by an off-duty Woodlake police officer. With the off-duty officer's assistance, Deputy Hernandez handcuffed each of the males and then searched each one. The minor had in his possession a small folding knife, with about a two-inch blade. Deputy Hernandez also recovered a loaded 9-mm handgun from inside a black jacket worn by one of the other males, later identified as Vincent B.

and as one of the participants in one of the robberies. No money was recovered from any of the suspects during the search.

The victims were brought by where the suspects were being detained for a field show-up to see if they could identify anyone as being involved in the robberies. Jose Ruiz was the only victim able to positively identify any of the detained individuals as participating in the robberies. Mr. Ruiz identified the minor and Vincent B. as his assailants.

Counts I and IV

On December 9, 2000, at approximately 8:00 p.m., in the city of Cutler, Jose Ruiz was walking down the sidewalk near his home. As Mr. Ruiz was walking, the minor and Vincent B. approached him. Mr. Ruiz described them as thin, wearing black jackets, and wearing hoods covering their heads. Vincent B., who according to Mr. Ruiz, was holding a knife with a three- to four-inch blade in his hand, grabbed onto Mr. Ruiz's shirt. The minor grabbed onto Mr. Ruiz's shoulder, and pointed a handgun at him. When Mr. Ruiz refused to give them his money the minor struck him in the head with the handgun, causing him to bleed. Mr. Ruiz said the blow made him want "to fall down to the ground." The minor, or Victor B., took Mr. Ruiz's wallet containing approximately \$257. The minor and Victor B. ran off down the street. Mr. Ruiz went to his home to wash off the blood from his head wound. It is unclear from the record whether Mr. Ruiz actually reached his residence, or whether he ran into police officers on his way to his residence. At some point, Mr. Ruiz came upon officers who were with "other people that had -- that similar things have happened to."

Mr. Ruiz was taken back to the scene of the robbery and one of the officers took photographs of Mr. Ruiz's injury. Mr. Ruiz was then transported to a location where the officers had detained four suspects. Officers admonished Mr. Ruiz before viewing the suspects. Mr. Ruiz positively identified the minor and Vincent B. as the ones who had robbed him earlier that evening, even though it was dark and the robbery had happened

very quickly. The identification of the minor and Vincent B. took place approximately two hours after the robbery.

Deputy Sandoval, who accompanied Mr. Ruiz back to the scene of the robbery, located an unexpended 9-mm round on the ground, and noted several shoe tracks in the area. Detective Winslow, who was in charge of the investigation, obtained the right shoe from each of the four detained suspects. Detective Winslow compared the shoe tracks with the shoe taken from the minor, and testified they appeared to be similar in their shape and shoe pattern to the tread design of the minor's shoe.

Count II

Miguel Lua was walking down the street in Cutler on the evening of December 9, 2000, accompanied by his friend, Jorge Coronado. Both Mr. Lua and Mr. Coronado were accosted by two young boys, about 15 to 18 years of age. One of them confronted his friend, while the other came up behind Mr. Lua. Mr. Lua felt something pointed at his side, which he believed was a handgun, as he heard the weapon being "racked."⁵ Mr. Lua's description of his assailants was limited to their clothing and their youthfulness. Mr. Lua described one as wearing a black jacket and white pants, while the other was wearing a light colored jacket. Mr. Lua's wallet, which contained approximately \$180, was taken from him. After his wallet was taken and the two boys left, Mr. Lua and Mr. Coronado walked to the Ace of Spades bar and used the public telephone outside of the bar to call the police.

Mr. Lua was unable to identify either of his assailants from the four subjects the officers had detained that evening, and was unable to identify the minor in court as being one of the young boys who accosted him and his friend that evening.

⁵ Cycling of the weapon to load a cartridge from the clip into the chamber of the weapon, or to remove a cartridge from the chamber of the weapon.

Detective Winslow observed shoe tracks near the location where the two young men approached Mr. Lua and Mr. Coronado. Detective Winslow again compared the shoe tracks with the shoes he had taken from the four detained suspects and noted that the minor's shoe seemed similar to the shoe tracks found at the scene, which was near a "large metal construction-type dumpster."

Count III

Mr. Coronado was walking with his friend, Mr. Lua, from the Progresso Bar to the Ace of Spades bar. It was approximately 8:00 p.m. While they were walking, "[s]ome kids came out from a dark street." One of the kids spoke in Spanish, demanding money from Mr. Coronado. Mr. Coronado said he did not have any. The kid who demanded money "frisked" Mr. Coronado. Mr. Coronado said he was not afraid during this encounter. Mr. Coronado was unable to identify any of the detained suspects as being one of those who accosted him or his friend.

Minor's statement

The minor, after being duly advised of his *Miranda* rights, waived those rights and agreed to speak with Detective Winslow.

The minor told Detective Winslow that on the evening of December 9, 2000, he went with three of his friends, Jesus B., Vincent B., and Humberto S., to Cutler. They parked their car in front of the "Quick Shop" and walked across town to visit a friend. Detective Winslow challenged the minor's version of events, and the minor admitted he had been involved in a "robbery" that evening near a dumpster by a bar. The minor said he had walked up and patted down a man, but did not find any money on him so he let him go. When asked if he would have taken the money if the man had had any, the minor said he would have because he "needed money for Christmas, to buy my mother and sister gifts."

Defense

The minor's defense challenged the identification of the minor by victim Ruiz, particularly focusing on the suspect who eluded the officer's efforts to detain him. Deputy Schrader described the fleeing suspect as an Hispanic male five feet eight inches tall, about 140 to 160 pounds, wearing white pants and a black top. In addition, the minor's uncle testified that the minor had been at his home in Dinuba at 8:00 p.m. on December 9, 2000. The uncle testified that they had planned on going to the store, and he remembered going out to start the car at around 8:25 p.m. The minor met some friends as he and his uncle were leaving to go to the store, and the minor decided to go with his friends instead. Two of the minor's friends were also two of the minors he was detained with in Cutler later that evening. The minor's uncle did not know the names of the minor's other friends.

DISCUSSION

On appeal the minor claims there was insufficient evidence to establish, beyond a reasonable doubt, that he committed the offenses the juvenile court found as true. Respondent contends the evidence was sufficient to support the true findings made by the juvenile court.

Standard of review

“The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. The court must view the entire record in the light most favorable to the judgment (order) to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the minor guilty beyond a reasonable doubt. In making such a determination we must view the evidence in a light most favorable to respondent and presume in support of the judgment (order) the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]’ [Citation.]” (*In re Paul C.* (1990) 221 Cal.App.3d 43, 52.)

In counts I-III, the minor was charged with two violations of section 211 and one attempted violation of section 211. “To constitute robbery the property must be

removed from the possession and immediate presence of the victim against his will, and such removal must be by force or fear.’ [Citation.]” (*People v. Nguyen* (2000) 24 Cal.4th 756, 761.) The prosecution therefore had the burden of proving, beyond a reasonable doubt, that the minor took, (or in the case of count III attempted to take) personal property from the possession of and immediate presence of each victim by means of force or fear.

The court found the robbery charge true in count I. The court found the minor to have committed lesser offenses in counts II and III.

The court found count II to be a violation of section 487, grand theft from the person, while count III was found to be an attempted violation of grand theft from the person. “Grand theft is theft committed in any of the following cases: [¶] . . . [¶] (c) When the property is taken from the person of another.” (§ 487, subd. (c).) This required proof the property was taken from the person, as opposed to being taken from their presence. (*In re George B.* (1991) 228 Cal.App.3d 1088, 1091-1092 [theft from the person contemplates that the property is upon or attached to the person or carried or held in physical possession].)

In addition, in count IV the court found true a violation of section 245, subdivision (a)(1), assault with a deadly weapon or by means of force likely to produce great bodily injury as to the victim Ruiz. “All that is required to sustain a conviction of assault with a deadly weapon is proof that there was an assault, that it was with a deadly weapon, and that the defendant intended to commit a violent injury on another. [Citation.] A battery, or a wounding[,], is not necessary in order to sustain a conviction for assault with a deadly weapon. [Citation.]” (*People v. Birch* (1969) 3 Cal.App.3d 167, 177.) Alternatively, a violation of section 245, subdivision (a)(1) can also be shown where it is established the force used was likely to produce great bodily injury. “[T]he question of whether or not the force used was such as to have been likely to produce great bodily injury, is one of fact for the determination of the jury based on all the evidence, including but not limited to the injury inflicted. [Citations.]” (*People v. Muir* (1966) 244 Cal.App.2d 598, 604.)

Victim Ruiz, counts I and IV

The minor contends that victim Ruiz's identification of him as the perpetrator of the robbery and assault is not accurate, contending the victim himself admitted the incident occurred very rapidly, it was dark and he had blood running down into his eyes. Additionally, the minor points to the trial court's ruling as to counts I and IV, and its statement questioning Ruiz's testimony that the minor was the one who struck him with the handgun. The court stated: "So I do have a doubt with respect to whether or not it was [the minor] or some other suspect -- some other individual who was in possession of that gun at that time, but in my view, the 211 in Count 1 has been shown true beyond a reasonable doubt." From this the minor distills that the identification is somehow suspect and cannot be the "substantial" evidence necessary to support the court's true finding as to counts I and IV.

"Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.) Here, victim Ruiz positively identified the minor, not once but twice. The first identification was within two hours of the robbery and assault. The second identification came at the minor's adjudication. "The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions." (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.) The other minor identified by Ruiz was in possession of a 9-mm handgun when detained, and a 9-mm unexpended round was located at the scene of the robbery.

The juvenile court, to the minor's benefit, expressed doubt only as to whether or not it was the minor who was actually in possession of, and used the 9-mm handgun, during the course of the robbery and assault. The court found as significant, in this respect, that the minor, when detained, was in possession of the knife, while his co-participant was in possession of the handgun.

There was substantial evidence during the course of the robbery of Mr. Ruiz that a handgun was displayed, and that Mr. Ramirez was struck in the head with the handgun. "[P]ointing an unloaded gun at another person with no effort or threat to use it as a

bludgeon, is not an assault with a deadly weapon. This is for the reason that there is no present ability to commit a violent injury on the person.’ (*People v. Orr* (1974) 43 Cal.App.3d 666, 672 . . .; accord, *People v. Sylva* (1904) 143 Cal. 62, 64 . . .; *People v. Glover* (1985) 171 Cal.App.3d 496, 504, fn. 6 . . .; *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 544)” (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1463, disapproved on another ground in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13-14.) There was substantial evidence of assault with a deadly weapon considering Mr. Ruiz’s testimony that he was struck in the head, causing a laceration, and the force of the blow was sufficient enough that it made him want “to fall down to the ground.”

The court made no explicit finding as to the personal use allegation (§ 12022.5, subds. (a) and (d)) alleged under count IV. However, it is quite clear from the court’s pronouncement as to the substantive offense that it did not find true beyond a reasonable doubt that the minor personally used a firearm during the commission of the assault on the victim. “Enhancement under section 12022.5 is only permitted upon proof that the defendant personally used a gun.” (*People v. Martinez* (1987) 194 Cal.App.3d 15, 24, italics omitted.) Therefore, as it was expressly found as to count I, this allegation, by implication, was found not true. (*In re Candelario* (1970) 3 Cal.3d 702, 706.)

Substantial evidence supports the juvenile court’s findings as to counts I and IV, including the special allegation it found true under count I, that a principal in the robbery was armed within the meaning of section 12022, subdivision (a)(1).

Victims Lua and Coronado, counts II and III

As to counts II and III, we agree with the juvenile court that the minor’s own statement to Detective Winslow supports the true findings as to these counts. The minor’s own admission regarding his “patting” down one of the victims and letting him go is virtually indistinguishable from Mr. Coronado’s testimony of the event. Additionally, the minor’s admissions to Detective Winslow destroys the alibi testimony of his uncle, since the minor’s own admission places the minor in Cutler at or near the time his uncle said he was in Dinuba.

In count III, since there was no property taken from victim Coronado, and Mr. Coronado's own statement that he was not in fear during this "patdown," it is clear the court had before it substantial evidence to find the minor to have attempted a grand theft from the person. The pronouncement of the court indicated that count III was found to be an attempted violation of section 487, subdivision (3)(c). We conclude this to be inadvertent missay by the court, as there is no section 487, subdivision (3)(c). It is clear from the entire record the court intended to find this as an attempted violation of section 487, subdivision (c), and we will direct the juvenile court to correct its records accordingly.

In count II, the court, again based upon the minor's admission, properly found him culpable of grand theft from the person of Mr. Lua. As the court was not convinced beyond a reasonable doubt that a weapon was used during the commission of this offense, it properly found a violation of section 487, and such finding was based upon substantial evidence. As with count III, it is clear from the entire record the court intended to find this as a violation of section 487, subdivision (c), and the juvenile court should correct its records accordingly. (*In re Candelario, supra*, 3 Cal.3d at p. 705.)

DISPOSITION

The judgment is affirmed. The juvenile court is ordered to correct its records to properly reflect the true findings as to counts II and III as discussed herein.